

[J-29-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

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| COMMONWEALTH OF PENNSYLVANIA | : | No. 52 W.D. Appeal Docket 1999 |
| DEPARTMENT OF ENVIRONMENTAL | : | |
| PROTECTION, | : | Appeal from the Order of the |
| | : | Commonwealth Court entered September |
| Appellant | : | 17, 1998 at No. 1601 C.D. 1997 affirming |
| | : | the Order of the Environmental Hearing |
| | : | Board entered March 17, 1997 at EHB |
| v. | : | Docket No. 90-050-MR. |
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| BETHENERGY MINES, INC., | : | |
| | : | ARGUED: March 6, 2000 |
| Appellee | : | |
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DISSENTING OPINION

MR. JUSTICE ZAPPALA

DECIDED: SEPTEMBER 29, 2000

I dissent. The Bituminous Mine Subsidence and Land Conservation Act authorizes the Department of Environmental Protection (DEP) to exercise the police powers of the Commonwealth for the purpose of protecting surface land areas which may be affected by underground coal mining. Act of April 27, 1966, Sp. Sess. No. 1, P.L. 31, § 2 as amended Oct. 10, 1980, P.L. 874, No. 156, § 1, 52 P.S. § 1406 et seq.

In order to effectuate this goal, DEP is empowered in two different ways. First, it regulates this type of mining under a permit scheme. Its power to grant, deny, change, revoke, and otherwise regulate the permits required for underground mining are drawn from sections 5-10, 52 P.S. § 1406.5-10, of the Bituminous Mine Subsidence and Land Conservation Act (the Act). Second, DEP may bring an enforcement proceeding in the

courts, seeking an injunction to prevent a violation of the Act, and to otherwise provide for its enforcement. 52 P.S. § 1406.13. The Act specifically states that “Commonwealth Court and the courts of common pleas shall have the power to award injunctions to prevent violations of this act and otherwise to provide for its enforcement upon suit brought by the [DEP]” 52 P.S. § 1406.13(a).

The powers of DEP to act unilaterally are limited, by the statute, to permitting and rulemaking. See 52 P.S. § 1406.5. The majority asserts that DEP’s authority to pursue enforcement action is found not in 52 P.S. § 1406.5, but rather in § 1406.9. That section states, in pertinent part:

The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to, orders modifying, suspending or revoking permits and orders requiring persons to cease operation. The right of the department to issue an order under the act is in addition to any penalty which may be imposed pursuant to this act. The department shall have the authority to order the immediate cessation of any operation that is being conducted without a permit, as required by this act, or in any case where safety regulations are being violated or in any case where the public welfare or safety calls for the immediate cessation of the operation until corrective steps have been started by the operator to the satisfaction of the department.

While this section does not limit DEP’s authority to issue orders to permitting only, it does not extend that authority to enforcement proceedings. That authority is reserved for the courts by section 1406.13. Only in situations where the mine is being operated without a permit, or where violations of regulations call for the immediate cessation of operation to ensure public safety does section 1406.9 authorize the issuance of an order halting operations. Since an enforcement action must be brought before the courts, the present order could not have been an authorized enforcement action under the Act.

The order issued by DEP in this case was a “Compliance Order” and was labeled as such. The purpose of the Compliance Order was to obtain Bethenergy’s compliance with the requirements of its issued permits. As the majority notes, the Compliance Order listed a series of violations of section 5(e) of the Act. That section of the Act states:

An operator of a coal mine ... shall adopt measures and shall describe to the department in his permit application measures that he will adopt to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the value and reasonable foreseeable use of such surface land

That section also states, “[t]he Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney’s fees it determines have been reasonably incurred ... pursuant to this section.” 52 P.S. § 1406.5(g).

Despite not having authority to pursue injunctive enforcement outside of the courts, DEP argues that the underlying order here was not an order relating to its permitting function. Yet, the order, in addition to listing the alleged violations under section 5(e), goes on to describe the remedial actions being ordered by DEP. The remedial portion of DEP’s order required Bethenergy to stop mining in certain geographical areas. Additionally, in various other geographical areas Bethenergy was ordered to stop mining until it submitted a remedial plan for restoration of the value of an affected stream; demonstrated to DEP’s satisfaction that a supported area would meet certain safety factor requirements; implemented a monitoring program; modified its subsidence control plan and six month maps; demonstrated that the mining is not having an effect on an above ground water supply; revised its subsidence control plan; revised its six month mining maps; and submitted various hydrogeological, geological, and biological analyses. These remedial measures track the permit requirements of section 1406 et seq. In fact, 52 P.S. § 1406.5,

which is titled "Permit; application; map or plan; bond or other security; filing; general rulemaking authority; prevention of damage; mine stability; maintenance of use and value of lands," describes the maps, surveys and studies required in order to obtain a permit. In essence, DEP's order listed requirements that Bethenergy was to meet or risk losing its permits. While the majority concludes that the Commonwealth Court and the Environmental Hearing Board elevated form over substance, I would find that the adjudications below correctly ascertained that in this case, form and procedural process properly followed substance. Therefore, I would hold that the Environmental Hearing Board was acting within the authority prescribed by the Act when it awarded fees and costs to Bethenergy.